

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:

CONCRETE PRODUCTS, INC.
(Chapter 11 Case 88-20540)

Debtor

CONCRETE PRODUCTS, INC.

Plaintiff

v.

THE HOME INSURANCE
COMPANY

Defendant

Adversary Proceeding

Number 92-2101

MEMORANDUM AND ORDER

Defendant filed its Motion for Summary Judgment on May 6, 1993. Upon consideration of Defendant's Motion and Brief, the other documentation filed by the parties, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed its Chapter 11 petition on October 3, 1988. On or about January 16, 1990, the Chapter 11 Trustee for the Debtor filed an adversary proceeding against Roof Decks, Inc (hereinafter referred to as "Roof Decks"). *See* Adversary Proceeding No. 90-2003. Roof Decks filed an answer and counterclaim against the Debtor (hereinafter referred to as "CPI"), seeking approximately \$231,246.00 in damages. Pursuant to 28 U.S.C. section 1409(d), this Court transferred the adversary proceeding to the Western District of North Carolina, where the case still pends.

Roof Decks alleges in its counterclaim that its damages arose out of CPI's breach of contract, failure to timely deliver products, failure to deliver products according to requested specifications, and failure to deliver goods of a merchantable quality. Roof Decks claimed that it incurred damages for repair and replacement of faulty work and materials supplied. Roof Decks also claimed that it incurred expenses for supplies, labor, and material as well as increased overhead due to CPI's poor work performance.

In its responses to interrogatories, Roof Decks states that its claims and defenses include, but are not limited to, "breach of contract, breach of express and implied warranties, products liability, negligence, and unfair and deceptive trade practices." (Response of Defendant Roof Decks, Inc. to First Interrogatories of Concrete Products, Inc., Number 3, attached to Defendant's Motion for Summary Judgment). As part of its responses to interrogatories, Roof Decks also provided a summary of its claims and defenses arising out of six projects; a multi-purpose building, Bowley Elementary School, Boiling Springs School, Western Avenue Baptist Church, Liberty School, and Gold Sand and Youngsville

Schools. Id. Roof Decks makes several allegations in the summary not explicitly made in the counterclaim. First, it alleges that some of the "Permadeck" supplied by CPI for the Liberty School project caused physical damage to the building which required Roof Decks to incur significant repair costs. Second, Roof Decks claims that one of the boards of Permadeck was of such poor quality that it broke, causing two Roof Decks employees to fall through the roof of the building and sustain serious injuries. Finally, Roof Decks claims that the incident caused its insurance premiums and overhead to increase, caused project delay, and constituted a significant factor in Roof Decks involvement in litigation and arbitration.

Defendant, Home Insurance Company, provided insurance for CPI under a comprehensive general liability policy (hereinafter referred to as the "Home insurance policy" or "policy"). Certain types of injuries and damage are excluded from coverage. The policy excludes:

(M) . . . loss of use of tangible property which has not been physically injured or destroyed resulting from (1) a delay in or lack of performance by or on behalf of the named insured of any contract or agreement, or (2) the failure of the named insured's product or work performed by on or behalf of the named insured to meet the level of performance, quality, fitness or durability warranted or represented by the named insured . . .

(N) . . . property damage to the named insured's product arising out of such product or any part of such product;

(O) . . . property damage to work performed by or on behalf of the named insured arising out of work or any

portion thereof, or out of materials, parts or equipment furnished in connection therewith;

(P) . . . damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's product or work completed by or for the named insured or for any property of which such product or work form a part if such products, work or property are withdrawn from the market or from use because of any known or suspected deficiency therein.

See Exhibit "A" attached to Defendant's Motion for Summary Judgment.

CPI made a demand upon Defendant to provide a defense and pay any judgment arising out of Roof Decks' counterclaim. Defendant denied coverage for the claim based on exclusionary language contained in the policy. The trustee for CPI subsequently filed this adversary proceeding against Defendant seeking a declaratory judgment to determine the rights of the parties under the insurance policy. Defendant filed this Motion for Summary Judgment arguing that subsections (M) through (P) of the insurance policy exclude coverage for the damages sought by Roof Decks and, therefore, Defendant is not required to provide a defense or pay any judgment resulting therefrom.

CONCLUSIONS OF LAW

Bankruptcy Rule 7056 incorporates Fed.R.Civ.P. 56 which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Bank, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). The movant should identify the relevant portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits to show the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 465 (1986). The moving party must support its motion with sufficient evidence and "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute . . . ". United States v. Twenty (20) Cashier's Checks, 897 F.2d 1567, 1569 (11th Cir. 1990) (*quoting* Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982)).

Once the movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991). The non-moving party must come forth with some evidence to show a genuine issue of material fact exists. United States v. Four Parcels of Real Property, 941 F.2d at 1438. The trial court should consider "all the evidence in the light most favorable to the non-moving party." Rollins v. Tech South, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987).

At the outset, it should be noted that, since Roof Decks' Counterclaim, as well as its first response to CPI's interrogatories, were apart of the record when Movant filed its Motion for Summary Judgment, I have considered the allegations contained in both in determining whether Home Insurance is liable under the terms of the policy. *See* Great Am. Ins. Co. v. McKemie, 244 Ga. 84, 85-86 (1979); Glen Falls Insurance Co. v. Donmac Golf Shaping Co., Inc., 203 Ga. App. at 508. Having reviewed all of the allegations, Roof Decks claims may be categorized as follows.

Breach of Contract

The Georgia Court of Appeals has had occasion to interpret exclusionary provisions in general comprehensive liability insurance policies that are very similar, if not identical, to the language in subsections (M), (N), (O) and (P) of Home insurance policy. *See e.g.*, Glen Falls Insurance Co. v. Donmac Golf Shaping Co., Inc., 203 Ga. App. 508, 511 (1992); Elrod's Custom Drapery Workshop v. Cincinnati Ins. Co., 187 Ga. App. 670 (1988); Gary L Shaw Builders v. State Auto. Mut. Ins. Co., 182 Ga. App. 220, 223 (1987). The Court of Appeals generally refers to these provisions as "business risk" exclusions, and has consistently held that policies containing these types of exclusions do not cover the business risk borne by the insured to replace defective products or repair defective work to make the product or work conform to the agreed contractual requirements. *See* Glen Falls Insurance Co. v. Donmac Golf Shaping Co., Inc., 203 Ga. App. 508, 511 (1992); Elrod's Custom Drapery Workshop v. Cincinnati Ins. Co., 187 Ga. App. 670 (1988); Gary L Shaw Builders v. State Auto. Mut. Ins. Co., 182 Ga. App. 220, 224 (1987). "The coverage applicable under [a general liability policy] is for tort liability for injury to persons and damage to other

property and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." Glen Falls Insurance Co. v. Donmac Golf Shaping Co., Inc., 203 Ga. App. at 511 (*quoting* Weedo v. Stone-E-Brick, Inc., 405 A.2d 788, 791 (N.J. 1979)).

An example which many courts have discussed to illustrate this principle is that of an insured contractor who has contracted to apply stucco to a wall in a building. If the contractor applies the stucco in a faulty manner and the stucco falls away, the contractor's liability insurer is under no obligation to defend or indemnify the contractor in a suit brought by the building owner to recover for damages arising from the owner having to replace or repair the stucco. In contrast, if a passerby suffers personal injury due to the falling stucco, the insurer would be obligated to defend and indemnify the contractor against potential liability arising from the injury. *See e.g.* Gary L Shaw Builders v. State Auto. Mut. Ins. Co., 182 Ga. App. 220 (1987) (*quoting* Weedo v. Stone-E-Brick, Inc., 405 A.2d 788, 791-92 (N.J. 1979)); LaMarche v. Shelby Mut. Ins. Co., 390 S.2d 325, 326-27; Reliance Ins. Co v. Povia-Ballantine Corp., 738 F. Supp. 523, 526 (S.D.Ga. 1990).

In the case before the Court, the bulk of the claims which RoofDecks makes against CPI appear to be based upon CPI's alleged breach of one or more contracts, warranties or other representations allegedly made in favor of Roof Decks. Specifically, Roof Decks claims that CPI:

- (1) breached one or more contracts between the parties;

- (2) failed to deliver certain products on a timely basis;
- (3) failed to deliver certain products according to specification;
- (4) failed to deliver certain products in a merchantable, non-defective condition; and
- (5) failed to properly install its products on a particular project.

Roof Decks further alleges that, as a result of these breaches, it was forced to repair work performed by CPI, replace defective and non-conforming products supplied by CPI, and cover at unfavorable prices when CPI failed to deliver certain products. Roof Decks also claims that it incurred litigation expenses due to CPI's slow and unreliable delivery of products.

I find that these claims and damages are excluded from coverage under subsections (M) and (P) of the policy. Subsection (M) provides that the policy does not cover the "loss of use of tangible property which has not been physically injured or destroyed resulting from [CPI's] delay in or lack of performance by or on behalf of [CPI], or . . . a failure of [CPI's] product or work performed . . . to meet the level of performance, quality, fitness or durability warranted or represented by [CPI]. This subsection plainly excludes consequential non-physical damages arising from CPI's failure to timely deliver or properly install its products. It also excludes from coverage any consequential non-physical damages which result from CPI's delivery of products which are defective, not to specification or in violation of any express or implied warranty.

Similarly, subsection (P) provides that the policy does not cover "damages claim for the withdrawal, inspection, repair, replacement, or loss of use of [CPI's] product or work completed by or for [CPI] or for any property of which such product or work form a part if such products, work or property are withdrawn from the market or from use because of any known or suspected deficiency therein." This subsection excludes from coverage damages which arise as a result of Roof Decks having to withdraw, repair, or replace CPI's products or any products of which they form a part, as well as any damages arising from Roof Decks losing the use of CPI's products.

In sum, these breach of contract claims and the resulting damages fall squarely within the ambit of the policy's "business risk" exclusions and, accordingly, are excluded from coverage under the Home Insurance policy.

Physical Property Damage - Liberty School Project

Roof Decks also alleges that it suffered actual physical property damage to the Liberty School project when CPI delivered Permadeck that was of such a poor quality that it damaged the school building.

Movant contends that under the Georgia Court of Appeals' decision in Gary L Shaw Builders v. State Auto. Mut. Ins. Co., 182 Ga. App. 220 (1987), this claim is excluded from coverage under subsection (N) of the policy, which provides that the policy does not apply to "property damage to [CPI's] product arising out of such product or any part of such product". *See* Defendant's Brief in Support of Motion for Summary Judgment, at 4.

However, there are several factual distinctions between Shaw and the case at bar which cause the holding in that case to be inapposite to this particular claim.

In Shaw the insured was a home builder who was sued by the purchasers of one of the builder's homes for certain alleged structural defects in the house. One of the counts in the homeowner's suit was based upon negligent construction and design of the house. The insurer denied coverage based upon two exclusions virtually identical to exclusions (N) and (O) in the case at bar, and sought a declaratory judgment from the court to that effect. The trial court granted summary judgment in favor of the insurer stating that "[t]he comprehensive general liability policy is not intended to insure against defective workmanship causing damage to the work product itself." Gary L Shaw Builders v. State Auto. Mut. Ins. Co., 182 Ga. App. at 221. In affirming the trial court's decision, the Court of Appeals held that the two exclusions to "clearly and unambiguously exclude coverage for property damage resulting from the insured's negligently constructed work product." Id. at 222.

Thus, Shaw involved a home builder whose finished product was the house itself. Consequently, any damage that the builder's faulty workmanship caused to the house would, by definition, be damage to his own work product, and therefore excluded under language contained subsection (N). CPI's finished work product, on the other hand, appears to be the allegedly defective Permadeck, which CPI shipped to Roof Decks so that Roof Decks could use it to build the portion of the building for which it was responsible (presumably the roof). Consequently, when CPI's allegedly defective Permadeck damaged the school building, it damaged either Roof Deck's or the general contractor's work product,

but not CPI's.

Thus, subsection (N) and (O) of the Home Insurance policy are, under the rationale of Shaw, and by their own terms, inapplicable to Roof Decks' claim for property damage to the Liberty school building. Exclusion (N) provides that the policy does not cover "property damage to [CPI's] product arising out of such product or any part of such product". (emphasis added). Again, the damaged work product in this instance was the school building, which is not CPI's work product. Likewise, exclusion (O) does not apply to the alleged property damage because it only excludes coverage of "property damage to work performed by or on behalf of [CPI] arising out of work or any portion thereof, or out of any materials, parts or equipment furnished in connection therewith" (emphasis added). Here, CPI did not perform the work, but merely supplied the Permadeck. Moreover, Roof Decks was not acting on behalf of CPI in its work on the project.

Therefore, I conclude that issues of fact remain as to whether Roof Decks' claim that the Permadeck supplied by CPI caused physical property damage to the Liberty School building is covered under the Home insurance policy.

Personal Injury Claim - Liberty School Project

Roof Decks also alleges that one of the same products supplied by CPI in the Liberty School project was of such poor quality that it broke, causing two Roof Decks employees to fall through the roof of the school building. This claim appears to be analogous to the passerby being struck by the falling stucco in the example previously cited.

CPI's product allegedly failed and caused personal injury, albeit to Roof Decks employees who were working on the project. Personal injury caused by the failure of the insured's product is not a "business risk" as defined by the Georgia Courts and is generally the type of occurrence which a comprehensive general liability policy is designed to cover. *See Glen Falls Insurance Co. v. Donmac Golf Shaping Co., Inc.*, 203 Ga. App. at 511. Moreover, Movant has not pointed to any exclusion in the policy which would exclude such an occurrence.

In its pleadings and responses to interrogatories, Roof Decks does not specify whether it considers the failure of the product and the resulting accident a breach of contract, a tort or both. Roof Decks alleges in the factual summary attached to its response to first interrogatories that the employees sustained serious injuries as a result of the accident, but does not elaborate. Roof Decks does, however, specifically list as resulting damages an increase in its insurance premiums and overhead expenses, delay of the project, and involvement in litigation and arbitration.

Since this is a summary judgment motion, I must resolve such ambiguities in favor of the non-Movant and assume that this claim sounds in tort. Therefore issues of fact remain as to whether this claim is excluded under the insurance policy.

Conclusion

With respect to the Roof Decks claims denominated as breach of contract claims in this order, I conclude that Movant has carried its initial burden of demonstrating the absence of any genuine issues of material fact. These claims include all claims arising

from the multi-purpose building project, the Bowley Elementary School project, the Boiling Springs School project, the Western Avenue Baptist Church project, the Gold Sand and Youngsville Schools project, as well as all claims arising from the Liberty School project except for any claims arising from the physical property damage to the school building and the personal injury to the two Roof Deck employees.

CPI has failed to respond with any evidence demonstrating the existence of a genuine issue of material fact as to whether the Home insurance policy covers these particular claims against it. Therefore, Movant is entitled to judgment that it is not obligated to pay or defend CPI on these claims as a matter of law.

Nonetheless, CPI, as the non-moving party in this proceeding, is entitled to have all evidence considered in the light most favorable to it. I conclude that, since it is unclear as to what theory Roof Decks will prosecute the Liberty School project property damage and personal injury claims under, Movant has not carried its burden of demonstrating the absence of any genuine issues of material fact with respect to these two claims. Therefore, Movant is not entitled to judgment as a matter of law with respect to its obligation to defend and pay on any claims arising from these particular allegations.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Defendant's Motion for Summary Judgment be

GRANTED as to all of CPI's claims except those arising out of the alleged physical property damage to the school building and personal injury to the employees on the Liberty School project. With respect to claims arising out of these allegations, Summary Judgment is DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of August, 1993.